Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-772

GARRETT FREIGHTLINES, INC.

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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GARRETT FREIGHTLINES, INC.

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on August 10, 1978.

CITATIONS TO OPINIONS BELOW

The unreported Findings of Fact, Conclusions of Law and Judgment of the trial court, U.S. District Court for the District of Utah, Northern Division, are printed in the Appendix, at page A-1.

The Opinion of the Tenth Circuit Court of Appeals which is unpublished is printed in the Appendix at page B-1. The Order of the Tenth Circuit Court of Appeals denying Petitioners petition for rehearing and suggestion for rehearing en banc is printed in the Appendix at page C-1.

JURISDICTION

The Opinion of the Tenth Circuit Court of Appeals was entered on June 21, 1978; the Order of the Tenth Circuit Court of Appeals denying Petitioner's petition for re-hearing and the mandate of the Tenth Circuit Court of Appeals was entered on August 10, 1978. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

Did the Tenth Circuit Court of Appeals follow the decisions of this court in determining: (a) whether the administrative set-off procedure utilized by the Government was unlawful, and (b) the proper definition of the term "article" utilized in the released rate provision?

STATUTORY PROVISION INVOLVED

49 U.S.C. Section 66, Same; Payment for Transportation-Deduction of Overcharges.

> (a) Payment for transportation of persons or property for or on behalf of the United States by any carrier or forwarder shall be made upon presentation of bills therefor prior to audit by the General Services Administration, or his designee. The right is reserved to the United States Government to deduct the amount of any overcharge by any carrier or forwarder from any amount subsequently found to be due such carrier or forwarder. This does not affect the authority of the General Accounting Office

> to make audits in accordance with the Budget and Accounting Act, 1921, and the Accounting and Auditing Act of 1950. The term "overcharges" shall be deemed to mean charges for transportation services in excess of those applicable thereto under tariffs lawfully on file with the Interstate Commerce Commission, the Civil Aeronautics Board, the Federal Maritime Commission, and any State transportation regulatory agency and charges in excess of those applicable thereto under rates, fares, and charges established pursuant to section 22 of this title, or other equivalent contract, arrangement, or exemption from regulation: *Provided, however,* That such deductions shall be made within three years (not including any time of war) from the time of payment of bills: *Provided, further,* That every claim for charges for transportation within the purview of this section shall be forever barred unless such claim shall be received in the General Services Administration, or by his designee within three years (not including any time of war) from the date of (1) accrual of the cause of action thereon, or (2) payment of charges for the transportation involved, or (3) subsequent refund for overpayment of such charges, or (4) deduction made pursuant to this section, whichever is later.
>
> *Review of action by General Services Administration; limitations*
>
> (b) Nothing in subsection (a) of this section hereof shall be deemed to prevent any carrier or forwarder from requesting the Comptroller General to review the action on his claim by the General Services Administration, or his designee. Such request shall be forever barred unless received in the General Accounting Office within six months (not including in time of war) from the date the action was taken or within the periods of limitation specified in the second proviso in subsection (a) of this section, whichever is later.

(c) Pursuant to regulations prescribed by the head of a Government agency or his designee and in conformity with such standards as shall be prom-

Advance payment

ulgated jointly by the Secretary of the Treasury and the Comptroller General of the United States, bills for passenger or freight transportation services to be furnished the United States by any carrier or forwarder may be paid in advance of completion of the services, without regard to section 529 of Title 31: *Provided,* That such carrier or forwarder has issued the usual ticket, receipt, bill of lading, or equivalent document covering the service involved, subject to later recovery by deduction or otherwise of any payments made for any services not received as ordered by the United States.

Definition

(d) The term "head of a Government agency" means any individual or group of individuals having final decisionmaking responsibility for any depart ment, commission, board, service, Government corporation, instrumentality, or other establishment or body in the United States Government.

STATEMENT OF THE CASE

This is an action brought by plaintiff-petitioner Garrett Freightlines, Inc. (Garrett) against the defendant-respondent United States of America (Government) for declaratory judgment. Garrett sought a declaration that it was not liable for damage to a certain Government freight shipment and a declaration that certain administrative set-off procedures being utilized by the Government to set-off freight damage claims against unrelated freight charges was unlawful. Garrett also sought injunctive relief to prevent the threatened set-off, but that issue was ren-

dered moot before service of process was achieved. By that time, the Government had already accomplished the set-off.

The Government had shipped a jet engine via Garrett to Hill AFB in Ogden, Utah. At the base where delivery was to be made, some other items shipped on the same truck were unloaded. Enroute to a second delivery point on the base, the jet engine rolled out of the truck and was damaged. The engine was repaired by the Government at a net cost to it of $8,110.62. The bill of lading on the engine contained a released rate provision to the effect that damage recovery was limited to $2.50 per lb. The total net cost of repair was held out of payments due Garrett on other freight shipments where there was no question that such freight charges were due.

At the trial level, evidence was adduced and the court found that the administrative set-off procedure being utilized by the Government in this case was unlawful. That procedure consisted of the practice of administratively withholding or "setting-off" freight charges due Garrett on unrelated shipments of freight as payment for freight loss damage claims which were disputed both as to amount and liability. In addition, the trial court ruled that Garrett was liable for the freight damage suffered by the Government, but that the appropriate method for calculating that damage was to apply the released rate provision in the Bill of Lading to the weight of the actual parts damaged rather than the weight of the entire unit shipped.

The Government appealed the case and the Tenth Circuit Court of Appeals reversed the decision of the trial court. With respect to the administrative set-off of the damage claim against unrelated freight charges, the Appeals Court held that the right to set-off *in suit* accorded

to the Government by this court in *United States v. Munsey Trust Co.*, 332 U.S. 234 (1947), should be expanded to include the right to anticipate such remedy of set-off in suit by administratively withholding funds prior to the time suit is commenced. The Appellate Court broadened the holding in spite of the specific directive of 49 U.S.C. §66 which requires the Government to promptly pay freight charges, and in spite of this court's holding in *United States v. Isthmian Steamship Co.*, 359 U.S. 314 (1959) to the effect that administrative set-off of funds to satisfy freight damage claims does not qualify as the "prompt payment" required by 49 U.S.C. §66.

The ruling of the Tenth Circuit Court of Appeals respecting application of the released rate provision in the bill of lading was to the effect that the limit of recovery set by the released rate provision applied to the weight of the entire jet engine rather than the weight of the damaged parts. Such ruling was made in the face of this court's holding in *Western Transit Co. v. A. C. Leslie & Co.*, 242 U.S. 448, 454 (1917), that "the valuation clause fixes not an arbitrary limit of recovery, but a ratio." See also, *Kansas City So. Rwy. Co. v. Carl*, 227 U.S. 639 (1912).

REASONS FOR GRANTING THE WRIT

1. The ruling of the Tenth Circuit Court of Appeals respecting the propriety of the administrative set-off utilized by the Government in this case significantly broadens the rule set forth in *United States v. Munsey Trust Co., supra.* The Circuit Court justified the actions of the Government by holding that it had the right to withhhold the funds "in contemplation of a right, in event of litigation, to set-off the amount unpaid against the recovery there sought by plaintiff." Appendix, p. B-4. Such holding not

only establishes new judicial precedent, but it is based upon circular logic. But for the deduction by the Government, no litigation would ever have been commenced by Garrett. There would have been no reason to do so. The damage claim being asserted belonged to the Government — not Garrett.

The effect of the Circuit Court's holding is to extend a right to the Government where none existed at common law or by statute in anticipation of a remedy which is nonexistent until the deduction is made.

In addition, the Government treats the deduction or set-off as payment of the unrelated freight charges. 49 U.S.C. §66 mandates that payment of freight charges by the Government shall be made upon presentation of the bills and prior to audit by the GAO. Furthermore, this court has already held that an administrative set-off does not constitute such payment.

In *United States v. Isthmian Steamship Co.*, 359 U.S. 314 (1959), the steamship company had transported certain freight for the government and asserted a bill for freight charges in amount of $116,511.44. The government only paid $1,307.68 and withheld the balance, asserting that it was a valid set-off against the freight charges. The alleged set-off arose out of a prior disputed claim the government had asserted against the steamship company regarding certain charter fees. The steamship company was eventually forced to sue the government for its money, and the government defended on the theory that the debt had been paid because the set-off cancelled the charges. This Court rejected the theory of the government and affirmed the holding of the district and appellate courts below to the effect that an administrtive set-off by the government

could not be set up as a defense of payment by the government. This Court drew a distinction between the right of the government to assert a set-off and the effect that the set-off was to be given. This distinction had been previously drawn and explained by the Second Circuit Court of Appeals in *Grace Line v. United States,* 255 F.2d 810 (2nd Cir. 1958).

In discussing the administrative set-off procedure being utilized by the government, the court in *Grace Line v. United States, supra,* noted that:

> [No] legislative history has been brought to our attention which supports the contention that administrative action by the Comptroller General in withholding money due to a creditor of the United States makes it unnecessary for the government to prove its claim on the merits, subject to such defenses as may exist in law or in fact, if it is to be applied against a claim of the creditor in setttlement thereof. In other words, *the attempted set-off must be a legally enforceable claim;* and the fact that the Comptroller General has decided the claim in favor of the government *ex parte by* withhholding the amount thereof from a payment justly due to a creditor of the United States neither constitutes a payment of and discharge of the debt nor does it stop the running of the statute of limitations against the government claim in alleged satisfaction of which the Comptroller General takes this unilateral action. 255 F.2d at 812, 813. [Emphasis added].

The court also discussed the set-off rights given to the government in *United States v. Munsey Trust, supra,* and noted that "it [The Supreme Court] was considering the situation where the creditor's debt to the United States was not disputed." 255 F.2d at 812, n. 3.

In the instant case, the holding of the Tenth Circuit Court of Appeals broadens the rule of *United States v. Munsey Trust Co., supra,* and ignores the mandate of this court in *United States v. Isthmian Steamship Co., supra,* and the direction of Congress in 49 C.S.C. §66. Such a holding should not be allowed to stand.

2. The released rate provision applicable to the freight shipment in this case reads as follows:

> THE AGREED OR DECLARED VALUE OF THE PROPERTY IS HEREBY SPECIFICALLY STATED BY THE SHIPPER NOT TO BE EXEEDING $2.50 PER LB. FOR EACH ARTICLE.

The trial court, based upon evidence presented as to the understanding and custom in the industry, held that the word "article" in this provision referred to the damaged parts and not to the entire shipment under the bill of lading. Appendix, p. A-3. The Court of Appeals ignored the evidence and reversed, holding that the word "article" in this provision applied to the complete shipment, i.e. the engine and its wheeled carrier. Appendix, p. B-6.

The effect of the appellate ruling is to utilize the released rate provision to establish an arbitrary limit of recovery based upon the weight of the shipment rather than to recognize the agreement of the parties that the liability of the carrier is limited to $2.50 times the weight of the parts actually damaged. If the definition of the word "article" utilized by the Tenth Circuit Court of Appeals is accepted, it merely encourages the shipper to attempt to characterize an entire shipment as an "article" and thus establish an arbitrary limit to its recovery. Such is not and never was the proper application of a released rate provision.

In *Western Transit Co. v. A. C. Leslie & Co., supra,* the plaintiff below, Leslie, had tendered 25 tons of copper ingots to the carrier for shipment from Houghton, Michigan to New York City, with intermediate diversion for storage at Buffalo, New York. While the copper was being stored in Buffalo, one ton was lost or stolen. Its value was $271.38. The released rate provision in that case declared the value at $100.00 per ton of copper. The shipper contended that the weight of the entire 25 ton shipment established the limit of recovery at $2,500.00. The carrier argued that the limit applied to the copper actually lost. This court, relying on the rule of *Kansas City So. Rwy. Co. v. Carl, supra,* held for the carrier, noting that "the valuation clause fixes not an arbitrary limit of recovery, but a ratio." 242 U.S. at 454.

Admitedly, the ratio principle is more easily applied to an homogenous shipment such as copper ingots than to fixtures on a jet engine. Nevertheless, it must be consistently applied. The only way this can be done is to limit the recovery to the *actual* weight of the parts or goods damaged, lost or stolen. Otherwise, the courts and parties are faced in every instance with solving a syllogism which has as its major premise the question of what constitutes the "article" for purposes of applying the released rate provision. For example is the "article" in a shipment of grain one kernel, a hundredweight or a carload? The only workable rule which can be applied is the rule utilized by the trial court in this case. The actual item lost, damaged or destroyed must form the basis for application of the released rate provision.

3. The questions presented for review in this Petition are of grave importance to the common carrier industry

generally. Carriers have relied on previous decisions of this Court in establishing freight charges and released rates for different classes of freight. In order for that process to be meaningful, a consistent and workable rule must prevail. The rule applied by the Circuit Court here is neither.

Likewise, the administratve set-off utilized by the Government here creates havoc for carriers. It allows the GAO to appoint itself judge, jury and marshal and unilaterally establish liability and damages for a freight loss claim and then effectively execute by withholding payment for other unrelated freight charges. Such a process forces the carrier to commence litigation and allows the Government to withhold needed cash flow until the claim is judicially determined. This places the carrier at an extreme financial disadvantage which was supposed to have been remedied by 49 U.S.C. §66.

For these reasons, the judgment of the Tenth Circuit Court of Appeals should be reviewed by this Court.

Respectfully submitted,

SNOW, CHRISTENSEN & MARTINEAU

Stuart L. Poelman

George A. Hunt

Attorneys for Petitioner

Appendices

APPENDIX A

Opinion of the District Court

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH
NORTHERN DIVISION

GARRETT FREIGHTLINES, INC.,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

FINDINGS OF FACT AND CONCLUSION OF LAW
No. NC-75-5

This matter having come on regularly for trial on the 6th day of May, 1976, before the Honorable Aldon J. Anderson, District Judge, sitting without a jury, and Stuart L. Poelman and George A. Hunt appearing for the plaintiff and Brent Ward, Assistant U.S. Attorney, appearing for the defendant, and the parties having adduced evidence and presented argument to the Court and the Court being fully advised in the premises, now enters the following:

FINDINGS OF FACT

1. Plaintiff is an Idaho corporation authorized by the Interstate Commerce Commission to operate as a common motor carrier in the transportation of property in inter-

state commerce.

2. Defendant, United States of America, by and through its Department of the Air Force, contracted with plaintiff on Government Bill of Lading H 4 732 236, dated January 18, 1973, for transportation of an internal combustion engine mounted on a wheeled trailer from Malstrom Air Force Base, Montana, to Hill Air Force Base, Utah.

3. The jet engine was specifically described by the defendant in the Bill of Lading as: "1 Quick Change Engine Change Units & Engine combined in metal shipping cradle, item 12240, NMFC A-12 3011891AV, Serial W-644175." The following statement was typed on the face of the Bill of Lading:

> The agreed or declared value of the property is hereby specifically stated by the shipper not to be exceeding $2.50 per lb. for each article.

4. The actual shipping weight of the above-described jet engine was 3,960 lbs. The Bill of Lading specified a single point of destination, i.e. "Hill AFB, Utah."

5. On January 32, 1973, the jet engine, along with other freight, was delivered by plaintiff to Central Receiving at Hill Air Force Base, Utah. The other freight was removed, leaving the jet engine unsecured. Defendant's agents instructed plantiff's driver to deliver the jet engine to another building on the Base and plaintiff's driver resisted. At the further urgings of the defendant's agents, plaintiff's driver agreed to take the jet engine to the other building after defendant's Transportation Officer, T. J. Ashton, acknowledged receipt of the shipment in good condition by signing the shipping invoice.

6. En route to the other building, the engine, mounted on the wheeled trailer, rolled out of the truck and was damaged. Both the plaintiff's driver and the defendant's said agents knew that the engine was not braced, tied down or otherwise secured in the delivery trailer at the time the delivery to the other building was attempted.

7. The defendant has since repaired the engine and replaced the wheeled shipping carrier. The actual cost of repair was $8,206.42. The damaged parts were salvaged. Their salvage value is $95.80. Total weight of the damaged engine and trailer parts which were replaced is 208 lbs.

8. The damaged engine was in fact an internal combustion engine mounted on a wheeled trailer. It was not boxed, crated nor mounted on a shipping cradle or on skids. The description of said engine and the classification reference noted by the defendant on the bill of lading was improper. The proper reference for said engine is Item No. 120820, Sub. 2, of National Motor Freight Classification A-12. Said item contains a release rate provision which limits the plaintiff's liability for damage to the shipment in an amount not to exceed $2.50 per lb. The weight to which the released value is referenced is the weight of the particular engine parts and attachments which sustained damage and not the total weight of the engine mounted on its wheeled trailer.

9. Prior to the commencement of this action, the defendant threatened to set off its damage claim of $8,110.62 against other freight charges owed by it to plaintiff, which freight charges were incurred from totally different shipments not involving damage claims and which freight charges had been incurred subsequent to the damage which

occurred to the jet engine and the payment of the freight charges arising out of the transportation of said engine. During final arguments in this action, counsel for defendant represented that defendant may have now actually performed its threatened set-off and withheld from plaintiff payment of freight charges in the sum of $8,110.62. In any event, defendant has maintained a continuing practice and course of conduct of deducting disputed damage claims from earned freight charges owed by defendant to plaintiff on shipments unrelated to those involving damage claims.

From the foregoing Findings of Fact, the Court draws the following:

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the above-entitled matter.

2. Venue of this action is properly laid in the Northern Division of the District of Utah.

3. Plaintiff had the responsibility to transport the jet engine from Central Receiving to the other designated building at Hill Air Force Base and, although plaintiff's driver attempted to avoid said responsibility by resisting the directive of defendant's agents and by first obtaining the signature of the defendant's agents on the delivery receipt, he did acquiesce to defendant's instructions and knowingly attempted to transport the engine to the other building in an unsafe manner. The acts of the defendant's agents were not enough to allow the plaintiff to avoid its liability to the defendant for damage to the engine.

4. Transportation of the jet engine was provided by plaintiff pursuant to the release rate provision of Item No. 120820, Sub 2, National Motor Freight Classification A-12, which limits plaintiff's liability to $2.50 per lb. of the weight of the damaged parts of the engine and wheeled trailer, or a total sum of $520.00.

5. It is improper for defendant to administratively set off its damage claims against unrelated freight revenues which it owes to the plaintiff or any other such carriers unless such damage claims are liquidated or undisputed and certain in amount.

6. Plaintiff is entitled to reimbursement from the defendant for plaintiff's costs in maintaining this action.

DATED this 16th day of August, 1976.

BY THE COURT:

/s/ Aldon J. Anderson
Aldon J. Anderson
U. S. District Judge

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH
NORTHERN DIVISION

GARRETT FREIGHTLINES, INC.,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

ORDER
No. NC-75-5

This matter having come on regularly for trial on the 6th day of May, 1976, before the Honorable Aldon J. Anderson, District Judge, sitting without a jury, and Stuart L. Poelman and George A. Hunt appearing for the plaintiff and Brent Ward, Assistant U.S. Attorney, appearing for the defendant, and the parties having adduced evidence and presented argument to the Court and the Court being fully advised and having heretofore made and entered its *Findings of Fact and Conclusions of Law* herein.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. In the event defendant has in fact heretofore set off against other freight revenues which it owes to plaintiff its claim for damage to its jet engine, which damage occurred on or about January 31, 1973 at Hill Air Force Base, defendant is hereby ordered to forthwith remit to plaintiff the full amount of such set-off.

2. In the event such a set-off has not heretofore been accomplished, defendant is hereby enjoined from making such a set-off.

3. Defendant is hereby ordered to revise its claim against plaintiff for said damages so as to reflect an amount consistent with the findings of the Court in this action.

4. Defendant shall have the right to assert against plaintiff any claim which it may now have for an overpayment of freight charges arising out of the transportation of the said jet engine.

DATED this 16th day of August, 1976.

BY THE COURT:

/s/ Aldon J. Anderson
Aldon J. Anderson
U. S. District Judge

APPENDIX B

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 76-2078

GARRETT FREIGHTLINES, INC.,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Appeal From The United States District Court
For The District Of Utah (D. C. #NC-75-5)

Wallace Boyack, Assistant United States Attorney (Ramon M. Child, United States Attorney, and Brent Ward, Assistant United States Attorney, with him on the Brief), for Appellant.

George A. Hunt, of Snow, Christensen & Martineau, Salt Lake City, Utah (Stuart L. Poelman, Salt Lake City, Utah, with him on the Brief), for Appellee.

Before SETH, Chief Judge, LEWIS and DOYLE, Circuit Judges.

SETH, Chief Judge.

This was begun as an action against the Government for declaratory judgment that the plaintiff Garrett Freightlines, Inc. was not liable for damage to a freight shipment, and for injunctive relief to prevent a set-off of the amount of claimed damage against other freight charges.

The trial court held that "set-off" was not permitted under these circumstances ,and also held that the shipment was described by the Government in the bill of lading. The trial court held that the released value formula should be applied to the weight of the damaged parts of the engine, and not against the weight of the engine. Under this theory the court awarded the Government damages in the amount of $520.00.

Garrett had shipped by truck a jet engine on a wheeled carrier. At the base where delivery was made, some other items shipped in the same truck were unloaded. The Garrett truck was going to another place on the base to unload the engine when the engine on the carrier rolled out the rear of the truck and was damaged. The engine was repaired by the Government at a net cost to it of $8,110.62. This amount was held out of the payments due Garrett on other shipments where there was no question that the amount was due.

The issue as to whether the shipment was properly described is basicallly a matter of a construction of the documents. The shipment was of an airplane jet engine with attachments to permit it to easily and quickly replace another engine in an airplane. The witness so described it, and referred to it as a "power pack'' or "quick engine unit.'' It was shipped on a wheeled shipping cradle and the shipment weighed 3,960 pounds. The bill of lading described the shipment as:

> "I QUICK ENGINE CHANGE UNIT & ENGINE COMBINED IN METAL SHIPPING CRADLE, ITEM 12240, NMFC A-12 301891AV, SERIAL W-644175."

Typed on the face of the bill of lading was the following:

> "THE AGREED OR DECLARED VALUE OF THE PROPERTY IS HEREBY SPECIFICALLY STATED BY THE SHIPPER NOT TO BE EXCEEDING $2.50 PER LB. FOR EACH ARTICLE."

The record shows that the accessories or the devices to adopt the engine to the aircraft into which it was to be installed were attached with nuts and bolts to the engine in such a way that the entire engine unit could be quickly placed in the aircraft. They were not attached merely for the shipment. The engine was on, and temporarily attached to the wheeled cradle to facilitate loading, unloading and movement generally preparatory to installation.

The proof demonstrates that there was but one article shipped which was a unit, an engine assembled and ready for use. It had, of course, many components or parts which had been assembled to make a complete jet engine ready to install.

We must hold that there was but one "article" shipped and but one "article" described on the bill of lading. This "article" was the complete unit. The trial court was thus in error in concluding that an "article" for the purposes of the released rate provision meant each of the damaged parts or components of the engine on disassembly.

We need not decide whether the engine was properly described or classified in view of the fact that it was but

one "article." Thus under a classification where the value release clause would be applicable, the $2.50 x 3,960 pounds yields a total greater than the amount of the claim. If the classification instead is the "power pack," the specific description, the value release clause is not applicable, and again there is a greater value applicable than the damage claim.

The parties use the term "administrative set-off" and the Government uses the term "common law administrative set-off." There is probably no such thing as an "administrative set-off" as a "set-off" has traditionally been used in most jurisdictions to describe the independent action or a plea by a defendant against a plaintiff's claim. It has been a plea in a judicial proceeding, and is generally considered not to be of common-law origin. Recoupment is of such origin. But in any event, what the Government administrative agency did was to withhold payment on some accounts due Garrett to accumulate an amount equal to the Government's damage claim. This withholding was thus in contemplation of a right, in event of litigation, to set-off the amount unpaid against the recovery there sought by plaintiff. In 49 U.S.C. §66, to be considered further hereinafter, the terminology used is to "deduct" amounts of overcharges from amounts subsequently found to be due a carrier. The remedy or right to assert a set-off in litigation is of little use unless by way of anticipation the party seeking to assert it has some funds of, or due to plaintiff in hand.

Thus under 49 U.S.C. §66 the Government is required to pay promptly claims for transportation, but is permitted, if overcharges are found, to "deduct" or withhold such amounts from future amounts found to be due to the carrier. Under the circumstances before us, which are

quite different from "overcharges," the Government may be required to pay the transportation charges promptly, but can also anticipate the remedy of set-off. This preparation for set-off is not provided for in 49 U.S.C. §66 which was created for "overcharges." *See Burlington Northern Inc. v. United States,* 462 F.2d 526 (Ct. Cl.). The Government has the right to the pleas of set-off in litigation, and again this right only has substance if there are unpaid accounts due the carrier.

This limited right to anticipate is not foreclosed by the fact that express statutory authority is provided only for "overcharges" in §66. The legislative history demonstrates the reason for the provision as does the discussion in *United States v. N.Y., N.H. & H. R. Co.,* 355 U.S. 253, and in *United States v Western Pac. R. Co.,* 352 U.S. 59.

The basic right to set-off in suit is examined in *United States v. Munsey Trust Co.,* 332 U.S. 234. The court there said:

> The government has the same right "which belongs to every creditor to apply the unappropriated moneys to his debtor, in his hands, in extinguishment of the debts due to him."

See also Barry v. United States, 229 U.S. 47. The discussion of set-off in *Grace Line v. United States,* 255 F.2d 810 (2nd Cir.), is whether under the circumstances the withholding of funds by the agency would constitute "payment."

The application of the doctrine set forth in *United States v. Munsey Trust Co.,* 332 U.S. 234, is without an expressed limitation as to whether the set-off is "liquidated," but it does refer to the claim there concerned against a painting contractor which was described as

"undisputed that $6,731.50 is the amount of damages sustained by the government. . . ." The court further mentioned that if the right of set-off was opposed by the contractor only, ". . . this case would present no difficulty." The court then continued with the quotation set forth hereinabove. We must view the circumstances in *Munsey* as comparable to those before us insofar as the nature of the Government's claim is concerned. The amount was here established by actual cost of repair and in *Munsey* by the actual cost incurred in completion of the contract. It is undisputed here that this was the cost incurred, and in our view this is sufficient to bring the case before us within the *Munsey* doctrine. Thus that the amount of "liability" may be here challenged and ultimately be governed by the shipping documents or classification makes no difference.

We must hold that the trial court was in error in its application of the released value to the weight of damaged components of the engine separately. There was but one "article" shipped. Also the Government had a right to withhold payments to Garrett preparatory to asserting its right of set-off in this litigation.

REVERSED and REMANDED for further proceedings.

APPENDIX C

Opinion of the Court of Appeals

Before Honorable Oliver Seth, Chief Judge
Honorable David T. Lewis, Circuit Judge
Honorable William J. Holloway, Jr., Circuit Judge
Honorable Robert H. McWilliams, Circuit Judge
Honorable James E. Barrett, Circuit Judge
Honorable William E. Doyle, Circuit Judge
Honorable James K. Logan, Circuit Judge

GARRETT FREIGHTLINES, INC.,
Plaintiff-Appellee,

vs.

UNITED STATES OF AMERICA,
Defendant-Appellant.

No. 76-2078

This matter comes on for consideration on the petition for rehearing with suggestion for rehearing en banc filed by appellee, Garrett Freightlines, Inc.

Upon consideration whereof, the petition for rehearing is denied by Chief Judge Seth and Circuit Judges Lewis and Doyle.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having reqeusted that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the petition for rehearing is denied.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS, Clerk

Supreme Court, U. S.
FILED
DEC 19 1978
MICHAEL RODAK, JR., CLERK

No. 78-772

In the Supreme Court of the United States

OCTOBER TERM, 1978

GARRETT FREIGHTLINES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

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GARRETT FREIGHTLINES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The judgment of the court of appeals was entered on June 21, 1978, and an order denying rehearing was entered on July 31, 1978.* The time for filing the petition for a writ of certiorari was not extended and therefore expired on October 30, 1978. 28 U.S.C. 2101(c). The petition was filed on November 9, 1978, and is thus out of time. The time limit of 28 U.S.C. 2101(c) is jurisdictional. See *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 417-418 (1923); *Department of Banking* v. *Pink*, 317 U.S. 264, 268 (1942).

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*Petitioner's statement that the order denying rehearing was entered on August 10, 1978, is incorrect. A certified copy of that order, bearing the correct date, is reprinted in the Appendix to this opposition. But even if the order had been entered on August 10, 1978, the petition still would be untimely. The 90th day from August 10, 1978, is November 8, 1978.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

DECEMBER 1978

DOJ-1978-12

APPENDIX

May Term-July 31, 1978

Before Honorable Oliver Seth, Chief Judge
Honorable David T. Lewis, Circuit Judge
Honorable William J. Holloway, Jr., Circuit Judge
Honorable Robert H. McWilliams, Circuit Judge
Honorable James E. Barrett, Circuit Judge
Honorable William E. Doyle, Circuit Judge
Honorable Monore G. McKay, Circuit Judge
Honorable James K. Logan, Circuit Judge

No. 76-2078

GARRETT FREIGHTLINES, INC., Plaintiff-Appellee,

vs.

UNITED STATES OF AMERICA, Defendant-Appellant.

This matter comes on for consideration of the petition for rehearing with suggestion for rehearing en banc filed by appellee, Garrett Freightlines, Inc.

Upon consideration whereof, the petition for rehearing is denied by Chief Judge Seth, and Circuit Judges Lewis and Doyle.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the petition for rehearing is denied.

/s/ HOWARD K. PHILLIPS, Clerk

HOWARD K. PHILLIPS, CLERK

Howard K. Phillips
Clerk, U.S. Court of
Appeals, Tenth Circuit

By
/s/ Sezanne Barrett
Deputy Clerk